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The Right to a Civil Jury Trial in ERISA Section 502(a)(1)(B) Actions: Wardel v. Central States, Southeast & Southwest Areas Pension Fund

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The Right to a Civil Jury Trial in ERISA Section 502(a)(1)(B) Actions: *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*

A teamsters union pension fund (the Fund) denied Claude Wardle's application for retirement benefits because Wardle allegedly lacked the requisite years as an employee in the industry.[1] Wardle sought review of the Fund's decision in federal district court under section 502(a)(1)(B) of the Employee Retirement Income Security Act (ERISA)[2] and demanded a jury trial of the issues.[3] The district court refused to provide a jury trial and subsequently upheld the Fund's decision to deny pension benefits to Wardle.[4] On appeal, the Court of Appeals for the Seventh Circuit affirmed both decisions of the trial court,[5] reasoning that Congress did not intend to provide jury trials in actions under section 502(a)(1)(B) of ERISA, and that because such actions present only equitable issues they do not fall within the jury trial guarantee of the seventh amendment. *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 922 (1981).

The right to a jury trial in statutory actions may derive from two sources. First, Congress may provide either explicitly or implicitly for a jury trial.[6] Second, regardless of congres-

1. During the periods in question, Wardle was an independent trucker who worked for two different companies. He contended that the years at issue should not be regarded as periods of self-employment but should be considered as "continuous service in the industry." Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 822 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 922 (1981).

2. ERISA § 502(a)(1)(B) entitles a participant or beneficiary to bring a civil action to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan." 29 U.S.C. § 1132 (1976).

3. 627 F.2d at 823. Wardle's complaint requested compensatory damages, punitive damages, and reasonable attorney fees and costs. *Id.*

4. *Id.*

5. Under a limited standard of review, the court held that the district court's determination that Wardle was self-employed was not arbitrary, capricious, or erroneous as a matter of law. *Id.* at 827.

6. *See, e.g.*, Jones Act, 46 U.S.C. § 688 (1976) (express grant of a jury trial); Federal Employers' Liability Act, 45 U.S.C. § 51 (1976) (implicit grant of a jury trial). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 92 (3d ed. 1976).

sional intent, the seventh amendment guarantees the right to a jury trial if the statute creates rights and remedies that would constitute a suit "at common law."[7] It is not clear whether either of these sources creates a right to a jury trial in actions based upon ERISA section 502(a)(1)(B); the *Wardle* court is the first circuit court opinion to address that question.[8] In holding against the right to a jury trial, the *Wardle* decision conflicts with the decision primarily relied upon by proponents of ERISA jury trials, a trial court ruling in *Stamps* v. *Michigan Teamsters Joint Council No. 43*.[9] The *Stamps* court held, on statutory grounds, that there is a right to a jury trial in actions based upon ERISA section 502(a)(1)(B).[10] The statutory analysis in *Wardle* is more convincing than that in *Stamps*, but both opinions failed to examine adequately the seventh amendment considerations involved. Although a more thorough constitutional analysis leads to the same result as that reached by the *Wardle* court, the court's failure to conduct a careful seventh amendment inquiry is significant. As statutory actions increasingly displace the common law, they will also displace the right to civil jury trial unless seventh amendment concerns are fully addressed.

In adopting ERISA, Congress did not expressly indicate whether it intended to create a right to jury trial in suits brought under section 502 of the Act. When faced with such situations, courts often examine whether Congress intended to provide equitable or legal relief, employing this traditional distinction to infer whether Congress intended to provide a right to a jury trial.[11] This approach to statutory construction is somewhat complicated, however, in the context of ERISA section 502(a). The cause of action in both *Wardle* and *Stamps* was based on subsection (1)(B) of section 502(a). That subsec-

7. U.S. CONST. amend. VII. For example, in Curtis v. Loether, 415 U.S. 189 (1974), plaintiff sought actual and punitive damages for a discriminatory refusal to lease an apartment in violation of Title VII. The Court held that because this was "an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions," it required a right to a jury trial regardless of possible legislative intent arguments to the contrary. *Id.* at 195. *See also* James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 656 (1963).

8. *See, e.g.*, Rice v. Hutton, 487 F. Supp. 278 (W.D. Mo. 1980) (eighth circuit has yet to determine whether ERISA beneficiary actions give jury trial right). *See also* Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980) (following the *Wardle* court's reasoning in denying jury trial under ERISA § 502).

9. 431 F. Supp. 745 (E.D. Mich. 1977).

10. *Id.* at 747. *See* text accompanying notes 14-15, 19-22 *infra*.

11. *See, e.g.*, Wirtz v. Jones, 340 F.2d 901, 903-04 (5th Cir. 1965) (Congress' use of "equitable restraint" language demonstrated intent not to provide jury trial in section 17 of the Fair Labor Standards Act).

tion entitles pension claimants to "recover benefits," "enforce rights" and "clarify rights to future benefits,"[12] but is silent as to whether such claims are legal or equitable. Subsection (3) of the same provision, however, provides for additional relief and clearly labels such relief as "equitable."[13] The *Stamps* court concluded that subsections (1)(B) and (3) must present alternative legal and equitable relief to beneficiaries, reasoning that if both gave only equitable relief, subsection (1)(B) would be surplusage.[14] Having thus concluded that the difference between subsections (1)(B) and (3) reflected an intent to provide "legal" relief under subsection (1)(B), the *Stamps* court ruled that Congress intended to provide the right to a jury trial.[15]

The *Wardle* court properly rejected this surplusage argument by noting that the two subsections differ jurisdictionally, and thus found that construing both to involve equitable relief would not render either section superfluous.[16] The Seventh Circuit's approach becomes even more persuasive when it is noted that the two subsections involve rights derived from wholly different sources. Subsection (3) provides exclusive federal jurisdiction over actions involving a breach of fiduciary responsibility and over actions to enforce benefits provided under Title I of ERISA.[17] Subsection (1)(B) provides for concurrent state and federal jurisdiction over benefit actions "which do not involve application of the Title I provisions."[18] Considering these purposeful differences between the two subsections,

12. 29 U.S.C. § 1132(a)(1)(B) (1976), *quoted in* note 2 *supra*.

13. ERISA § 502(a)(3) specifies that a participant, beneficiary, or fiduciary may bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate *equitable* relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3) (1976) (emphasis added).

14. 431 F. Supp. at 747.

15. *Id.*

16. 687 F.2d at 828-29. ERISA § 502(e)(1) reads:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1132(e)(1) (1976). The subsections would not be superfluous since "[t]he specific types of claims enumerated in § 502(a)(1)(B) would still have to be separated in some manner from general equitable actions under § 502(a)(3) because Congress granted state courts concurrent jurisdiction only over § 502(a)(1)(B) claims." 627 F.2d at 829.

17. *See* H.R. CONF. REP. No. 1280, 93d Cong., 2d Sess. 327 [hereinafter cited as REP. No. 1280], *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5038, 5107.

18. *Id.*

there is little reason to conclude that the implicit intent of Congress was to provide legal relief and a jury trial for one action but equitable, non-jury relief for the other.

A second argument suggesting that Congress intended to provide a right to jury trial is based upon the legislative history of ERISA. The conference committee report indicates that actions under ERISA section 502 are to be "regarded as arising under the laws of the United States in similar fashion to those brought under [section] 301" of the Taft-Hartley Act.[19] The *Stamps* court interpreted this language to mean that a court should follow the substantive and procedural federal case law formulated under section 301 whenever it might apply to ERISA questions.[20] Because some actions under Taft-Hartley section 301 have been held to include the right to a jury trial,[21] the *Stamps* court concluded that Congress must have intended that ERISA claimants be afforded similar rights.[22]

Some overlap between ERISA and the Taft-Hartley Act does occur because section 302 of the latter provides guidelines for "the establishment and operation of pension funds administered jointly by an employer and a union."[23] The legislative

19. Stamps v. Michigan Teamsters Joint Council No. 43, 431 F. Supp. at 747. The joint explanatory statement of the conference committee reads: "All [ERISA § 502] actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947 [Taft-Hartley Act]." REP. NO. 1280, *supra* note 17, at 327, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5038, 5107. Section 301 of the Taft-Hartley Act gives federal courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations" and allows such organizations to "sue or be sued as an entity." 29 U.S.C. § 185(a)-(b) (1976).

20. 431 F. Supp. at 747; *see* REP. NO. 1280, *supra* note 17, at 327, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5038, 5107.

21. The *Stamps* court cites Lucas v. Philco-Ford Corp., 380 F. Supp. 139 (E.D. Pa. 1974), for the proposition that section 301 beneficiaries have the right to a jury trial. The *Lucas* case, however, involved an employee suing his union for not fairly representing him and suing his employer for wrongful discharge. *Id.* at 146. Such a suit is readily distinguishable from the beneficiary-trustee suits under ERISA. Moreover, no court has yet provided a jury trial right in Taft-Hartley pension-related cases. On the other hand, numerous cases involving pension claims under the Taft-Hartley Act, while not directly addressing the jury trial question, have been tried without a jury. *See, e.g.*, Knauss v. Gorman, 583 F.2d 82, 85 (3d Cir. 1978); Lugo v. Employees Retirement Fund of Illumination Prods. Indus., 529 F.2d 251, 253 (2d Cir.), *cert. denied*, 429 U.S. 826 (1976); Haynes v. Lewis, 298 F. Supp. 331, 332 (D.D.C. 1969); Bolgar v. Lewis, 238 F. Supp. 595, 596 (W.D. Pa. 1960).

22. 431 F. Supp. at 747.

23. H.R. REP. NO. 533, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4642. Pension guidelines are provided under Taft-Hartley to exempt joint pension funds from a general prohibition against employer payments to labor organizations. Allowing such payments is thought to pro-

history of ERISA section 502, however, makes reference only to section 301 of Taft-Hartley,[24] the jurisdictional basis for the substantive rules of section 302, but not to section 302 itself. The *Wardle* court interpreted this cross reference to mean that Congress intended courts to develop a separate federal common law under ERISA, in a "similar fashion" to the development under section 301 of the Taft-Hartley Act.[25] This approach will not require all of the procedural and substantive rules under the Taft-Hartley Act to be transferred to ERISA. Instead, ERISA actions would be treated as presenting issues for development of a separate federal common law.[26]

The *Wardle* court's interpretation seems more plausible when the differences between Taft-Hartley and ERISA are considered. The range of possible actions under Taft-Hartley is quite broad and includes alleged breaches of collective bargaining agreements which are clearly legal contract claims that are triable to a jury.[27] In contrast, ERISA section 502 focuses more narrowly on claims for pension benefits and mentions only "equitable" rights when it characterizes such rights at all.[28] Given these substantial differences, there is little reason to believe that Congress intended to incorporate the entire body of Taft-Hartley case law in ERISA actions or that it sought to incorporate only the right to a jury trial when it could have done so more directly.

Thus, both statutory interpretation arguments relied upon by the *Stamps* court fail to demonstrate an intent by Congress to create the right to a jury trial in actions under ERISA sec-

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duce a risk of collusion between employers and unions to the detriment of employees. *See* Note, *ERISA's Title IV and the Multiemployer Pension Plan*, 1979 DUKE L.J. 644, 646.

24. *See* note 19 *supra*.

25. 627 F.2d at 829. *Accord*, Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888, 893 (1st Cir. 1978). *See* note 26 *infra*. *See also* Reiherzer v. Shannon, 581 F.2d 1266, 1271 (7th Cir. 1978).

26. As the *Wardle* court noted, the House report indicates that courts are to rule on ERISA questions "just as the Supreme Court in *Textile Workers Union v. Lincoln Mills* . . . ruled that the courts could establish federal common law for claims 'arising under' § 301 of the Labor-Management Relations Act." Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d at 829. *Lincoln Mills* involved an extension of Article III "arising under" power to permit development of a federal common law respecting federal statutes. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

27. *See, e.g.*, Clark v. Kraftco Corp., 510 F.2d 500, 501 (2d Cir. 1975) (contesting the binding effect of an accountant's decision under a collective bargaining agreement); Rosen v. Hotel & Restaurant Employees & Bartenders Union, 494 F. Supp. 521, 522 (E.D. Pa. 1980) (suit against employers for failing to pay in benefits to the fund).

28. *See* notes 2-7 *supra* and accompanying text.

tion 502. The *Wardle* interpretation is far more convincing. Absent any affirmative evidence of an intent to create the jury trial right, no such right should be judicially provided.[29]

Regardless of congressional intent, if a statutory cause of action creates rights and remedies found at "common law," the seventh amendment guarantees a jury trial for that cause of action.[30] The test for whether the seventh amendment applies to a particular statute, however, is somewhat in flux. The traditional approach to the seventh amendment employed a static historical test: only those claims that were historically legal rather than equitable would be guaranteed the right to a jury trial.[31] Application of this historical test was relaxed—and the right to civil jury trial arguably expanded—by a number of Supreme Court cases addressing the implications of modern procedural reforms.[32] Recognizing that equitable relief is available only when legal relief would be "inadequate," the Supreme Court acknowledged that modern procedural reforms have made legal relief more often "adequate,"[33] and thus that previously equitable actions could be tried to a jury.[34] The

29. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974) (noting that Congress may affirmatively imply a right to a jury trial, not that such a right is presumed absent intent to the contrary). *See also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2314 (1971).

30. Curtis v. Loether, 415 U.S. 189, at 194 (1974). As a commentator on *Curtis* has observed: "The relevant inquiry is whether the statutory action involves rights and remedies of the sort recognized at common law, even if the particular action was then unknown." Note, *The Seventh Amendment—A Return to Fundamentals*, 10 URBAN L. ANN. 313, 318 (1975).

31. C. WRIGHT, *supra* note 6, at § 92. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830) (holding that "common law" means "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those in which equitable rights alone were recognized."). *But see* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 736 (1973) (arguing that the intent of the amendment was not to maintain a static historical test but rather to employ a dynamic distinction that would respond to changing social pressures). Under traditional analysis, courts use the standard of the common law practice in England in 1791, the date when the amendment was adopted. *See* C. WRIGHT, *supra* note 6, at § 92.

32. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531 (1970) (jury trial right found for legal issues in shareholder derivative suit, a previously equitable action); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (defendant entitled to jury trial because plaintiff sought legal along with equitable relief); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1958) (finding right to jury trial in case involving both legal and equitable elements with a common factual issue). *See also* Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979) (suggesting that these decisions reflect trend of contemporary seventh amendment jurisprudence "away from fixed historical classifications of claims toward categories adjusted to reflect modern procedure").

33. Examples of procedural reforms include the liberal joinder rules under FED. R. CIV. P. 18, and the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976).

34. *See* Ross v. Bernhard, 396 U.S. 531, 542 (1970); Beacon Theatres, Inc. v.

Supreme Court last pronounced this "adequacy of the remedy" approach in 1970 in *Ross* v. *Bernhard*,[35] when it noted that the seventh amendment inquiry should focus upon the "nature of the issues to be tried rather than the character of the overall action."[36] In *Ross*, for example, the Court deemed the underlying issues in a shareholder derivative suit legal and held that the action as a whole was triable to a jury, even though such actions had previously been considered equitable.[37]

The potentially sweeping effect of this approach was limited, however, by a footnote in the *Ross* opinion which suggested that whether the underlying issue in a case is legal or equitable depends upon (1) the pre-merger custom; (2) the remedy sought; and (3) the practical limitations and abilities of juries.[38] The first two criteria imply a continuing emphasis on the traditional factors—the historical nature of the action and the type of remedy sought.[39] When these two factors point toward the same conclusion, the third criterion—the practical limitations and abilities of juries—might not be reached at all.[40] Since *Ross*, the Supreme Court has been silent regarding use of the three part test,[41] and although lower courts have split in

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Westover, 359 U.S. 500, 509-10 (1959). *See also* Comment, Ross v. Bernhard: *The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 121 (1971) (contending that the *Ross* "adequacy of the remedy" approach could expand jury trial rights to all formerly equitable actions except those within the exclusive jurisdiction of equity). The dissenters in *Ross* also argued that the majority's opinion extended, rather than preserved, the seventh amendment right to a jury trial. 396 U.S. at 543 (Stewart, J., dissenting). *See also* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 489 (1975) (arguing that because jury trial is inefficient, courts should employ a strictly historical test that restricts the use of jury trials).

35. 396 U.S. 531 (1970).

36. *Id.* at 538.

37. *Id.* at 542. *Ross* involved a shareholder derivative action in which the plaintiff sought money damages for an alleged breach of contract and gross negligence—claims traditionally considered legal. *Id.*

38. *Id.* at 538 n.10. *See* Note, *The Right to Jury Trial Under the Age Discrimination in Employment and Fair Labor Standards Acts*, 44 U. CHI. L. REV. 365, 369 (1977) (arguing that the three-part test retracts from the expansive "adequacy of the remedy" approach, returning to the historical limitations). *See also* Comment, *supra* note 34, at 126.

39. *See* Note, *supra* note 38, at 369-70.

40. *See* Note, *supra* note 38, at 369. *But see* Note, *The Right to Trial by Jury in Complex Litigation*, 20 WM. & MARY L. REV. 329 (1978) (emphasizing the failure of the Court to indicate the weight to be given to each of the three factors). Professor Wolfram argues that, if the third criterion is used apart from the other criteria, federal judges would have a "disturbingly broad discretion" to both expand and contract jury trial rights. Wolfram, *supra* note 31, at 644.

41. *See* Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974). One court has argued that the Supreme Court's lack of refer-

their use of the test,[42] the majority of lower courts have employed it as an analytical tool to examine whether the nature of the issues in a case warrant a jury trial.[43]

Neither the *Wardle* court nor the *Stamps* court employed all three of these criteria in deciding whether there is a right to a jury trial under ERISA section 502(a)(1)(B). Instead, both courts relied primarily upon a static historical test, albeit with conflicting results. The historical analysis of both courts, however, can be treated as an application of the first *Ross* criterion—consideration of the pre-merger custom.[44] The *Wardle* court analogized an ERISA suit to the historically equitable beneficiary-trustee action,[45] while the *Stamps* court considered an ERISA action to be more like a suit for breach of a third-party beneficiary contract which was recognizable at common law and as such, triable to a jury.[46]

Because an ERISA action is a pension beneficiary claim

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ence in these cases to the *Ross* footnote illustrates the test's invalidity, but the same court also concedes that the opposite inference could be drawn: the Supreme Court would not "overturn so significant a decision without some comment." Zenith Radio Corp. v. Matsushita Elec. Indus., 478 F. Supp. 889, 928 & n.64 (E.D. Pa. 1979), *vacated sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). *See also* Note, *supra* note 40, at 348 (concluding that, although it is questionable whether the *Ross* test is constitutionally mandated, it should be used in deciding jury trial questions).

42. At one extreme some courts have imbued the criteria with constitutional stature. *See, e.g., In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 104 (W.D. Wash. 1976). The most vigorous objection to the *Ross* criteria has come from courts that view the third element as a potential "complex cases" exception to the seventh amendment. *See, e.g., In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 432 (9th Cir. 1979); United States v. J.B. Williams Co., 498 F.2d 414, 428-29 (2d Cir. 1974).

43. *See, e.g.*, Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138, 142-43 (5th Cir. 1979); Hildebrand v. Trustees of Michigan State Univ., 607 F.2d 705, 707 (6th Cir. 1979); Minnis v. UAW, 531 F.2d 850, 852-53 (8th Cir. 1975); Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n, 519 F.2d 1200, 1218 (3d Cir. 1975); Dawson v. Contractors Transp. Corp., 467 F.2d 727, 731 (D.C. Cir. 1972); Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499, 503-04 (D. Del. 1977).

44. It is not clear, however, whether "pre-merger custom" refers to the traditional 1791 standard or whether it requires resort to the jumble of state and federal decisions between 1791 and 1935. *See* Wolfram, *supra* note 31, at 643-44. *See also* C. WRIGHT, *supra* note 6, at 454 (little support that the *Ross* criteria are being used to reject traditional historical practices).

45. 627 F.2d at 829.

46. 431 F. Supp. at 746. Jury trial proponents could argue that "because *Curtis* and *Pernell* [*see* note 41 *supra*] did not limit the right to jury trial to exact copies of the 1791 forms of actions" but enabled courts to analogize new actions to other actions at common law, the third-party beneficiary analogy seems to hold at least as much vitality as the beneficiary-trustee analogy. Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize Seventh Amendment Right*, 58 TEX. L. REV. 549, 561 (1980) (discussing Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974)).

against the trustees of a pension fund, it does appear more closely analogous to the old beneficiary-trustee form of action;[47] thus the first *Ross* criterion supports denial of the right to a jury trial. Rigid historical analysis, however, has been widely criticized by commentators[48] and even the *Ross* approach treats this factor as just one of the elements for consideration.

The second *Ross* criterion—the type of remedy sought—seems a better measure of whether an action should be deemed legal or equitable.[49] Indeed, the *Stamps* court reasoned that the remedy sought—money damages—reinforced its analogy to a contract action.[50] Although the *Wardle* court ignored the question of remedy, careful analysis indicates that the *Stamps* court misapplied this factor. First, not all money damage claims are considered "legal."[51] For example, actions against a trustee for breach of trust, as in *Wardle*, "are a classic example of the power of an *equity* judge to require a defendant to pay money."[52] In addition, an inflexible rule that all claims for money damages are "legal" would ignore the distinction between those rights recognized only in equity, and those demands heard in equity only because of the inadequacy of the

47. *See* RESTATEMENT (SECOND) OF TRUSTS § 197 (1959), *quoted in* Sichko v. Lewis, 191 F. Supp. 68, 69 (W.D. Pa. 1961).

48. *See, e.g.*, Comment, *From* Beacon Theatres *to* Dairy Queen *to* Ross: *The Seventh Amendment, the Federal Rules, and a Receding Law-Equity Dichotomy*, 48 J. URB. L. 459, 471 (1971) ("[T]he explicit reference in the Seventh Amendment to a bifurcated system of justice as a point of definition for the scope of the jury trial is difficult to insert meaningfully in a merged jurisdiction, where many of the lines of definition are blurred.").

49. Professor McCoid suggests that "[t]he law-equity distinction is a useful basis for a principle distinct from the historical result test, only insofar as it provides an effective means of continuing characterization." McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 11 (1967). He then argues that the Supreme Court in *Beacon Theatres* met the problem "by suggesting that whether an issue is legal or equitable is determined by the nature of the relief to which it is material." *Id.* at 11-12. The second *Ross* criterion—the nature of the remedy sought—encompasses such an analysis and perhaps becomes a more useful criterion than the "pre-merger custom."

50. *See* 431 F. Supp. at 746. *See also* Curtis v. Loether, 415 U.S. 189, 195 (1974) (money damage claim generally indicates "legal relief").

51. *See* Curtis v. Loether, 415 U.S. 189, 196 (1974); Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979); Kirst, *supra* note 46, at 571. Persons claiming backpay under Title VII of the Civil Rights Act have been denied the right to a jury trial. *See* Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499, 503 (D. Del. 1977). *See also* Note, *supra* note 38, at 365.

52. SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 95 (2d Cir. 1978) (emphasis added). *See also* Note, *Right to Jury Trial Under the Age Discrimination in Employment Act*, 43 MO. L. REV. 250, 251 (1978).

legal remedy.[53] Most importantly, a claim for pension benefits, even if drafted as a claim for money damages, actually seeks both an order (in the nature of restitution of funds paid into the Fund)[54] and, in effect, an affirmative injunction compelling future payment of benefits (presumably calculated over life expectancy and reduced to their present value).[55] Because both of these underlying remedies are clearly equitable,[56] ERISA actions, characterized in terms of "the remedy sought," must also be equitable.

The third and more dubious criterion of the *Ross* test introduces the functional approach to seventh amendment analysis in examining the practical limitations and abilities of juries.[57] The *Wardle* court touched on the practical limitations

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53. In his study of the effects of *Beacon Theatres*, Professor McCoid argues that:

> [W]hether an issue is legal or equitable is determined by the nature of the relief to which it is material. Damages are legal; injunctions are equitable. . . . Substantive factors other than remedy were sometimes controlling. The trust, for example, was a creature of equity. Hence, an action by the beneficiary against the trustee, even for money, normally was consigned to equity jurisdiction.

McCoid, *supra* note 49, at 11-12 (footnotes omitted). Because the *Ross* Court stressed that jury trials should extend to actions that have been saved from inadequate legal remedies by procedural reforms, actions that were tried in equity regardless of the adequacy of the remedy should be unaffected by the *Ross* requirements. *See* Ross v. Bernhard, 396 U.S. 531, 540 (1970).

54. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.) (backpay award is equitable in nature, not punitive, since it restores recipients to their rightful economic status), *cert. dismissed*, 404 U.S. 1006 (1971).

55. *Cf.* Baeten v. Van Ess, 474 F. Supp. 1234, 1231, (E.D. Wis. 1979) (beneficiary awarded "full interest" in pension plan).

56. *See* G. KEETON & L. SHERIDAN, EQUITY 459 (1969); RESTATMENT OF RESTITUTION § 4 (1937).

57. This functional approach has created an extensive legal controversy in relation to jury trials in complex cases. *See, e.g.*, Arnold, *Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 848 (1980) (no historical right to trial in equity because of the complexity of the issues); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 62 (1980) (chancellor historically could take suit into equity because of complexity of the case). *See generally* Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99 (1979). Although earlier cases permitted a complexity exception, *see In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 105 (W.D. Wash. 1976), a recent court of appeals decision rejects use of "the practical limitations and abilities of juries" standard to deny a jury trial of legal issues in a complex case. *In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 432 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

The third criterion, however, may not be determinative when the two other factors provide a clear characterization of an action as legal or equitable. *See* Note, *supra* note 38, at 369. *See also* Pernell v. Southall Realty, 416 U.S. 363, 369 n.34 (1974) (Court looked solely to the historical practice of eviction actions); Curtis v. Loether, 415 U.S. 189, 194 (1974) (Court looked only to the nature of the rights and remedies involved in a statutory action).

of juries, arguing that actions, like ERISA actions, involving a limited standard of review of another's discretionary power "have been and should be" tried by a judge and not by a jury.[58] Similarly, the *Wardle* court's emphasis of the historical roots of this review standard implies some considerations of jury limitations—the limited view of jury capabilities included in those historical roots is arguably the foundation of much equity jurisdiction.[59] Such reasoning is highly questionable, however, in light of the prevailing belief that numerous factors other than jury capability formed the actual rationale for placing most actions in equity.[60]

Apart from this historical argument, two other considerations bearing on jury capability might be raised—the possible complexity of ERISA actions[61] and possible jury bias.[62] Neither consideration, however, is persuasive. Although the complexity concern has been raised in large-scale technical or antitrust litigation,[63] a single beneficiary's suit to determine his or her eligibiltiy for pension benefits hardly presents the same complexity problem.[64] Similarly, although there may be legitimate concern for juror prejudice in an action pitting a large pension fund against an individual retiree, the potential for prejudice is no greater than that in the multitude of actions that presently are jury-tried.[65]

Thus, consideration of the practical limitations and abilities

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58. 627 F.2d at 830.

59. *See* Devlin, *supra* note 57, at 107 (chancellor had the power to stop a suit at common law if "practical abilities" of juries were "not up to the complexities of the case"); Note, *supra* note 38, at 370 n.34.

60. *See* Comment, *supra* note 34, at 130 (suggesting that the law-equity division was less a judgment as to the limitations of juries, but rather was "largely a product of the power struggle between the equity chancellor and the common law courts.") *See also* Arnold, *supra* note 57, at 838-39 (arguing that suits for accounting were tried in equity because of the equity court's unique discovery and subpeona powers, rather than the unsuitability of the jury).

61. *See* note 57 *supra*.

62. *See* Redish, *supra* note 34, at 502-04. The Supreme Court has also recognized possible problems of juror prejudice in jury-tried Title VIII actions. *See* Curtis v. Loether, 415 U.S. 189, 198 (1974).

63. *See*, *e.g.*, *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 105 (W.D. Wash. 1976); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 926 (E.D. Pa. 1979), *vacated sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). *See also* note 57 *supra*.

64. "Neither issue, entitlement, or the amount of damages, is of such complexity as to be beyond the capabilities of a jury, so the third aspect of the test has no significant bearing upon the question presented [in an ERISA beneficiary suit]." Davis v. Huge, 91 L.R.R.M. 2234, 2236 (E.D. Ky. Dec. 12, 1975).

65. For example, products liability actions typically pit an individual plaintiff against a large manufacturer. *See*, *e.g.*, Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980).

of juries is at best inconclusive as a factor in deciding whether ERISA actions should come within the seventh amendment. Thorough analysis of the first two *Ross* criteria, however, clearly demonstrates the equitable nature of the ERISA action.[66] Tracing an ERISA action through the *Ross* criteria confirms that it is equitable in substance and not in the category of formerly equitable actions that have been "saved" from inadequate legal remedies by changes in modern procedure. The ERISA action therefore falls outside the modern scope of the seventh amendment.

The *Wardle* court's decision to deny a jury trial reaches the correct result on constitutional grounds and offers the better reasoned statutory interpretation. *Wardle* rather than *Stamps* should be followed by other courts in ruling on demands for a jury trial in actions under ERISA section 502.[67] Nonetheless, the *Wardle* court's failure to address adequately seventh amendment concerns cannot be taken lightly. Statutory causes of action are increasingly displacing common law actions and if the seventh amendment is to be faithfully honored, its guarantee of the right to a jury trial must be fully considered in every statutorily created cause of action.

66. Because the pre-merger custom and remedy criteria demonstrate the equitable nature of ERISA actions, denial of a jury trial based partly on perceived limitations of juries would not present the same problem as when an otherwise legal issue is denied a jury trial because of the limitations of the jury. *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 926 (E.D. Pa. 1979), *vacated sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).

67. The Fifth Circuit subsequently followed the *Wardle* court's lead in denying a right to trial by jury under ERISA § 502, but unfortunately also failed to address adequately the seventh amendment question. Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980).